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SUPREME COURT OF THE UNITED STATES

October Term 1984

JOHN TERRY MORELAND,

Petitioner

v.

CARL W. POSS, SR.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

James J. Macie
Attorney for Petitioner

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April 26, 1985

63pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the United States Supreme Court's holding in Lugar v. Edmondson Oil Company to be limited to the particular context of prejudgment attachment cases?

2. Assuming that Lugar applies in the context of a false imprisonment case, may a private party be deemed "a person for whom the State is responsible"?

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OPINIONS DELIVERED BELOW

John Terry Moreland filed suit against Carl W. Poss, Sr., a private attorney, on 17 February 1982 alleging deprivation of federal constitutional rights, malicious arrest, false imprisonment, invasion of privacy, conversion, assault and battery and trespass. The malicious arrest claim was subsequently abandoned. Joined as defendants were the sheriffs of DeKalb and Rockdale Counties and several deputies. Attorney Poss and the DeKalb County Sheriff and his deputies brought motion for summary judgment. Although motion for summary judgment by the DeKalb County Sheriff and his deputies was denied, the motion for summary judgment by Attorney Poss was granted as to all counts on 24 October 1983. A copy of that order is Exhibit A in the Appendix. The Georgia Court of

Appeals then affirmed the trial court on the claims for invasion of privacy, conversion, assault and battery, and trespass, but reversed the trial court on the claims for deprivation of federal constitutional rights and false imprisonment. This opinion is found at 171 Ga. App. 733, 320 S.E.2d 841 (1984) and is included as Exhibit B in the Appendix. The Georgia Supreme Court then reversed the Georgia Court of Appeals on the claim for deprivation of federal constitutional rights. This opinion is found at 253 Ga. 730 (1985) and is included in the Appendix as Exhibit C.

GROUNDS FOR JURISDICTION

The date of the entry of the decision of the Georgia Supreme Court is 9 January 1985. Motion for rehearing was denied on 29 January 1985. A copy of the denial is included in

the Appendix as Exhibit D. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 and 28 U.S.C. §2104.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Amendment XIV §1 to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petitioner invoked 42 U.S.C. §1983 in filing his suit:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

> or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The petitioner also invoked 42 U.S.C. §1988:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

John Terry Moreland and Lisa Bailey Moreland were granted a divorce in DeKalb County (Georgia) Superior Court on 30 December 1980. The settlement agreement which was incorporated into the final judgment and decree of divorce imposed child support and property settlement obligations on Mr. Moreland.

In the ensuing five weeks, he fell $432.00 in arrears on those obligations because he was hospitalized and thus unemployed. On 9 February 1981, Carl W. Poss, Sr., an attorney retained by Lisa Bailey Moreland, filed what he styled a "Citation for Contempt" in DeKalb County Superior Court. This document is of paramount importance in this case. In its fourth paragraph it states:

> It is further ordered by this Court that the Sheriff of DeKalb County or his lawful deputy arrest the defendant, JOHN TERRY MORELAND, and incarcerate him in the common jail of Dekalb County until he purges himself of this contempt by paying to LISA BAILEY MORELAND the sum of THREE HUNDRED ($300.00) DOLLARS in arrearage of child support and ONE HUNDRED THIRTY TWO ($132.00) DOLLARS in arrearage on the automobile. (Emphasis added).

The only signature at the bottom of this "order" was that of Mr. Poss

himself. Thereafter, the DeKalb County Sheriff's office processed this bogus document as a valid arrest order. Acting at the request of the DeKalb County Sheriff's office, Rockdale County deputy sheriffs went to Moreland's Rockdale County home and took him into custody on two separate occasions, on 18 February 1981 and on 23 February 1981. On the first occasion he was released after a brief time. On the second occasion he was transported to the DeKalb County jail where he was incarcerated for several hours until his fiancee (now his wife) paid $432.00 to procure his release in the middle of the night. On 25 February 1981 Moreland's home was entered a third time by Rockdale County authorities seeking his arrest; this time, however, the deputy left when

shown a receipt for the previously paid $432.00.

It is important to note that at no time did any judge order Moreland's arrest. The only written "authority" for the arrest was the "Citation for Contempt" filed by Poss. Poss did obtain a rule nisi setting a hearing on his contempt citation for 27 February 1981, but the rule nisi hearing was an irrelevancy because by that time Moreland had already been accosted three times by law enforcement officials.

Poss's active involvement in the pre-hearing arrests of Mr. Moreland did not cease with the mere filing of his "Citation for Contempt." Rebecca Sutton Henderson, who was at that time supervisor of the civil section of the DeKalb County Sheriff's office,

testified on deposition that she and her associates had been "pushed" by Poss in processing and expediting his pleading as a valid arrest order. She explicitly detailed direct conversations in which Poss pressed for Moreland's arrest on no authority beyond the "Citation for Contempt" he had filed. Although Poss has categorically denied having been a party to such conversations, Mrs. Henderson testified that she had dealt with him on numerous previous occasions and that she was able to recognize his voice; that he identified himself on two occasions when he called; and that on one occasion she placed a call to him which he received at his office, during which conversation he insisted over her protests that what he had filed was a valid arrest

order. Mrs. Henderson's deposition includes the following answers to questions propounded to her:

A. I went back to the radio room and I called that number and I asked to speak to Mr. Poss. Someone on the other end of the line came on and talked to me, and I informed them that that paper was evidently not enough to arrest Mr. Moreland on, and they, in turn, implied to me that the paper we had was fine.

Q. The someone who came on the line, was that the same person or a different person from the one with whom you had previously spoken who had been identified as Mr. Poss?

A. I believed it to be the

same person.

Q. So in placing the call, you believed that you were speaking with Mr. Poss?

A. Yes.

Q. Could you tell us, as well as you can remember, exactly what you said and exactly what response you got from the very moment the conversation began?

A. The exact words I can't give. All I can say is that I said, "Mr. Poss, are you aware that this paper is not a direct order for us to arrest Mr. Moreland?" The response on the other end implied to me -- and I don't know the exact words that he used -- that, yes, it was quite suffi-

cient to arrest.

Mrs. Henderson composed an intra-office memo regarding these incidents within a few days after they occurred. The memo is included within the Appendix as Exhibit E.

There is even more. Moreland stated on deposition that he authorized a phone call from an attorney to Poss to warn him of the impropriety of Poss's pleading, and that the attorney in his presence placed such a phone call to Poss on the morning of 23 February 1981, that is, on the morning before Moreland was arrested and incarcerated in the DeKalb County jail. This was an appointment scheduled by Moreland with the attorney in reaction to the failed attempt to incarcerate him on February 18th. What this demonstrates is that Poss

had a chance to stop the process before Moreland was ever actually arrested, but chose not to do so.

FEDERAL QUESTION

There has been a federal question in this case from the very day it was filed on 17 February 1982. In his original complaint, Moreland, the plaintiff, listed as his primary claim a cause of action for "gross violation of section 1983 of Title 42 of the United States Code." His prayer for relief included a plea for attorney fees under 42 U.S.C. §1988. The case of Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922 (1982), upon which the Georgia Supreme Court based its opinion, was not cited at all by the Georgia Court of Appeals.

ARGUMENT

1. IS THE UNITED STATES SUPREME

COURT'S HOLDING IN LUGAR V. EDMONDSON OIL COMPANY TO BE LIMITED TO THE PARTICULAR CONTEXT OF PREJUDGMENT ATTACHMENT CASES?

A footnote to the Lugar majority opinion stated that the holding was "limited to the particular context of prejudgment attachment." Lugar, 457 U.S. at 939 n. 21. That this limitation was not to be taken lightly was indicated by the fact that Justice Powell in dissent felt constrained to deal with it and to criticize it. Lugar, 457 U.S. at 951 n. 8. The instant case is clearly not a prejudgment attachment case. Yet the Georgia Supreme Court, without apology, bases its opinion squarely on Lugar. Furthermore, there are critical factual distinctions between Lugar and the instant case: Edmondson Oil Company took

its petition against Lugar to the clerk of the state court, who in turn issued a writ of attachment to be executed by the county sheriff. By contrast, Poss himself ordered the county sheriff to arrest and incarcerate Moreland, without invoking the power or authority of any court. This Court summarized the Fourth Circuit holding in Lugar as follows:

> The court held that a private party acts under color of state law within the meaning of §1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree.

Lugar at 457 U.S. 926.

In the instant case, Moreland indeed alleges that Poss usurped official power in such a way that the

independence of the enforcing officers was compromised to a significant degree. Thus it is probable that Moreland would have met the even more restrictive and less liberal reading of §1983 given it by the Fourth Circuit. As the Lugar case reached this Court, this Court did not need to deal with the usurpation-of-official-power question because it was not before the Court. That distinction had already been made in the plaintiff's favor by the Fourth Circuit. Thus the instant case is fundamentally different from Lugar in the sense that the instant case involves a usurpation of power whereas Lugar involved an invocation of power.

The State of Georgia has a remedy for contempt of court the validity of which Moreland does not question.

Crocker v. Crocker, 132 Ga. App. 587, 208 S.E.2d 602 (1974). Mendel v. Mendel, 202 Ga. 675, 44 S.E.2d 257 (1947). Poss did not misuse or abuse this contempt remedy in the Lugar sense; he ignored and circumvented that remedy completely and assumed state police power unto himself with the unwitting assistance of two sheriffs and their several deputies.

2. ASSUMING THAT LUGAR APPLIES IN THE CONTEXT OF A FALSE IMPRISONMENT CASE, MAY A PRIVATE PARTY BE DEEMED "A PERSON FOR WHOM THE STATE IS RESPONSIBLE"?

The Georgia Supreme Court applied to the facts of the instant case what it termed the "fair attribution test" of Lugar. The court never reached the question of whether Poss was a "state actor" because it found that

the first part of the "fair attribution test" had not been met. In other words, it found that the deprivation of constitutional rights in this case was: (1) not caused by the exercise of some right or privilege created by the state; (2) not caused by a rule of conduct imposed by the state; and (3) not caused by a person for whom the state is responsible. In the presentation of its analysis of the three subparts of the first part of the "fair attribution test," the Georgia Supreme Court states: "Neither is Poss, a private attorney, a person for whom the state is responsible." Poss at 732. In making this statement, the Georgia Supreme Court shows that it misconstrues the requirement of the third subpart. Moreland does not need to demonstrate that Poss,

the private attorney, is a person for whom the state is responsible. It suffices to demonstrate that the deprivation of Moreland's constitutional rights was caused by some person or persons for whom the state is responsible, not necessarily Poss himself. Three circuit courts, in making the same tripartite division of the first part of the "fair attribution test," have found that the third subpart is satisfied when the deprivation of constitutional rights is caused by some person for whom the state is responsible, even if not the private party defendant himself or herself.

In Cruz v. Donnelly, 727 F.2d 79, 81 (3rd Cir. 1984), the plaintiff sued a grocery store and its employee, who had requested the police to strip-search a customer. Applying the Lugar

analysis, the court holds: "In Cruz' case, the first prong is satisfied, since all the alleged deprivations of constitutional rights were committed by West Chester police officers exercising their investigative powers -- 'a person for whom the state is responsible.'" In other words, the plaintiff was not required to show that the grocery store employee was himself a person for whom the state is responsible.

In Morrison v. Washington County, Alabama, 700 F.2d 678, 683-684 (11th Cir. 1983), the administratrix of the deceased's estate sued, among others, a private physician who called the police to a hospital to arrest a patient for drunkenness. That court states the first part of the Lugar attribution test and finds that it

was met: "In the case at bar, the alleged deprivation was caused in part by persons for whom the state is clearly responsible -- the hospital staff and county police." In other words, the plaintiff was not required to show that the private physician was himself a person for whom the state is responsible.

In Howerton v. Gabica, 708 F.2d 380, 384 (9th Cir. 1983), the evicted tenants sued their private landlords. That court held: "The Howertons claimed the Gabicas chose a middle road, using the police to facilitate an illegal repossession. If true, we think this constituted state action." In other words, the plaintiffs were not required to show that the landlords themselves were people for whom the state is responsible.

Perhaps the Georgia Supreme Court diverged from these circuit court opinions from a false belief that a private party charged with a constitutional deprivation (Poss) must be the same one who was the immediate cause of the deprivation. We believe the better rule to have been stated by the 9th Circuit: "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." Johnson v. Duffy, 588 F.2d 740, 743-744 (9th Cir. 1978).

As a corollary to what has already been stated, we might point out that

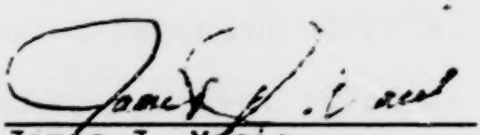
there appears to be some confusion in the circuits about whether the first part of the Lugar fair attribution test contains three subparts or just two. In Dahlberg v. Becker, 748 F.2d 85 (2nd Cir. 1984), it is clear that that court understands the first prong of the fair attribution test to have two subparts rather than three. In other words, that court reads Lugar to mean that the deprivation of constitutional rights must be caused (1) by the exercise of some right or privilege created by the State, or (2) by a rule of conduct imposed by the State or by a person for whom the State is responsible. The appellant in the instant case believes this Court to have meant the first prong of the test to have three subparts rather than two, and suggests that

the instant case might provide an opporunity to clarify the matter by the placement of two commas in appropriate places (i.e. after the first two times that the word "State" is used).

CONCLUSION

For all of the reasons stated above, writ of certiorari should issue to review the judgment and opinion of the Georgia Supreme Court in this case.

Respectfully submitted,



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April 26, 1985

EXHIBIT A

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN TERRY MORELAND,

Plaintiff

v.

CARL W. POSS, SR.,
et al.,

Defendants

CIVIL ACTION
FILE No. C83539

ORDER

The Motion of Defendant Carl W. Poss, Sr. for Summary Judgment filed of record August 1, 1983, having regularly come on for hearing and oral argument by all interested parties in open Court on October 24, 1983, and the Court having considered all evidence on the record properly before the Court and the arguments presented by counsel in

accordance with O.C.G.A. § 9-11-56, and it appearing that there is no genuine issue as to any material fact and that Defendant Poss is entitled to judgment as a matter of law as to all claims asserted by the Plaintiff against Defendant Poss in this action, Defendant Poss' Motion for Summary Judgment is hereby GRANTED. SO ORDERED.

This 24th day of October, 1983.

/S/_____
Hon. John S. Langford, Jr.
Fulton County Superior Court

PRESENTED BY:

/s/_____
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Attorneys for Defendant Carl W. Poss, Sr.

EXHIBIT B

171 Ga. App. 733, 320 S.E.2d 841 (1984)

John Terry Moreland,

Appellant

v.

Carl W. Poss, Sr.

No. 68435

Georgia Court of Appeals

July 5, 1984

Rehearing denied July 24, 1984

BANKE, Presiding Judge.

Acting as attorney for the appellant's former wife, appellee Poss filed a "citation for contempt" against the appellant, based on his alleged failure to make child support and property settlement payments as required under the terms of a divorce decree. The fourth paragraph of this petition stated as follows: "It is further ordered by the court that the sheriff of DeKalb County or his lawful deputy arrest the

defendant, JOHN TERRY MORELAND, and incarcerate him in the common jail of DeKalb County until he purges himself of this contempt by paying to LISA BAILEY MORELAND the sum of THREE HUNDRED ($300.00) DOLLARS in arrearage of child support and ONE HUNDRED THIRTY TWO ($132.00) DOLLARS in arrearage of the automobile." (Emphasis added.) It is undisputed that no such order had in fact been issued by the court. However, certain personnel in the DeKalb County Sheriff's Office apparently came to believe that such an order had been issued, and a request for the appellant's arrest was consequently transmitted from DeKalb County to Rockdale County, where the appellant resided. The appellant was thereafter arrested by Rockdale County sheriff's deputies and was incarcerated for several hours, until the $432 arrearage was paid on his behalf.

In the present action, the appellant asserts damage claims against Poss, the sheriffs of DeKalb and Rockdale Counties, and several other named and unnamed officials of the two sheriff's departments, based on violation of his federal constitutional rights, malicious arrest, false imprisonment, invasion of privacy, conversion (in reference to the $432 which was paid to procure his release from custody), assault and battery, and trespass. The malicious arrest claim was subsequently abandoned; and, after considerable discovery, the trial court granted a motion by Poss for summary judgment as to all the remaining counts of the complaint. This appeal followed.

The official in the DeKalb sheriff's office who processed the arrest documents testified that she had engaged in telephone conversations with a person

purporting to be Poss in which she had been led to believe that a court order had been issued for the appellant's arrest. While Poss denies having been a party to any such telephone conversations, this witness stated that she was able to recognize his voice, having spoken with him on prior occasions. Held:

1. The trial court erred in granting summary judgment to the appellee with respect to the civil rights claim. A cause of action exists under 42 USC § 1983 against any person who causes another to be deprived of his constitutional rights under color of state law. See generally Monroe v. Pape, 365 U.S. 167 (81 SC 473, 5 LE2d 492) (1961). "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in

motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." Johnson v. Duffy, 588 F2d 740, 743-744 (9th Cir. 1978).

A private attorney will not be deemed to have acted under color of state law merely because, as a duly licensed officer of the court, he invokes the judicial process to obtain relief for his client. See Henderson v. Fisher, 631 F2d 1115, 1119 (3d Cir. 1980). However, the appellee in this case is alleged to have done much more than merely invoke the judicial process on behalf of his client. He is alleged to have deliberately misrepresented to law enforcement personnel that the appellant had been adjudicated in contempt of court when in fact no such adjudication had taken place. Such a wilful perversion of the

judicial process by an attorney has previously been held to give rise to liability under 42 USC § 1983. See Buller v. Buechler, 706 F2d 844, 852-853 (8th Cir. 1983); U. S. Gen., Inc. v. Schroeder, 400 FSupp. 713 (E.D.Wis. 1975). Cf. Rankin v. Howard, 633 F2d 844 (9th Cir. 1980). The appellee's reliance upon Hansen v. Ahlgrimm, 520 F2d 768 (7th Cir. 1975), is misplaced. In the first place, that decision was disapproved in Dennis V. Sparks, 449 U.S. 24, n. 3 (101 SC 183, 66 LE2d 185) (1980). Moreover, the alleged liability of the attorney in that case was predicated on his having sought and obtained a court order resulting in the plaintiff's arrest and incarceration, not on his having misrepresented the existence of such an order.

2. "Generally a private person who causes or directs the arrest of another

by an officer without a warrant may be held liable for false imprisonment, in the absence of justification. Therefore one who actively instigates or procures an arrest, without lawful process, is generally regarded as the principal for whom the officer acts, and he may be liable to respond in damages." Webb v. Prince, 62 Ga. App. 749 (1) 752 (9 SE2d 675) (1940). See also OCGA § 51-7-20; Hill v. Henry, 90 Ga. App. 93, 95 (2) (82 SE2d 35) (1954). It follows that the trial court also erred in granting summary judgment to the appellee on the false imprisonment claim. Nothing in Melton v. Jenkins, 50 Ga. App. 615 (2) (178 SE 754) (1934), is authority for a different conclusion. The court's holding there was merely that an attorney who had in good faith invoked a court ruling adjudicating the plaintiff in contempt and orderir; his incarceration

could not be held liable for damages for false imprisonment, despite a later determination that the court had exceeded its jurisdiction in issuing the order. As emphasized in Division 1, supra, the distinguishing feature of the present case is that the defendant is alleged to have procured the appellant's arrest and incarceration by misrepresenting to law enforcement personnel that an arrest order existed, when in fact it did not.

3. The claims for invasion of privacy, conversion, assault and battery, and trespass are all based on the theory that the officers who effected the appellant's arrest were acting as Poss' agents in doing so. However, it is clear from the record that the officers were not in fact acting on behalf of Poss but were at all times purporting to discharge their official duties. There is no contention that these additional

defendants were engaged in any sort of unlawful conspiracy with Poss to violate the appellant's rights. Therefore, in view of the fact that the appellant has a complete remedy against Poss based on either the § 1983 claim or the false imprisonment claim, we hold that the trial court properly granted Poss' motion for summary judgment with respect to the remaining tort claims.

Judgment reversed in part and affirmed in part. McMurray, C. J. and Pope, J., concur. Benham, J., disqualified.

DECIDED JULY 5, 1984 -

REHEARING DENIED JULY 24, 1984 -

CERT. APPLIED FOR

Action for damages. Fulton Superior Court. Before Judge Langford.

James J. Macie, for appellant.

Jeffrey O. Bramlett, Jeffrey M. Smith, for appellee.

EXHIBIT C

253 Ga. 730 (1985)

Carl W. Poss, Sr.,

Appellant

v.

John Terry Moreland

No. 41462

Georgia Supreme Court

January 9, 1985

Rehearing denied January 29, 1985.

GREGORY, Justice.

John Terry Moreland filed suit for damages in Fulton Superior Court against Carl W. Poss, Sr., an attorney, and others. He alleged Poss had wrongfully caused him to be arrested and confined. The complaint sets forth several state law tort claims and a claim under Federal law, 42 USC §§ 1983 and 1988. After discovery, Poss filed a motion for summary judgment as to all claims then

pending against him. The trial court granted the motion and Moreland appealed to the Court of Appeals. The Court of Appeals affirmed the trial court except as to the federal law claims and as to one of the state law claims, false imprisonment. We granted certiorari to determine if the grant of summary judgment against the federal law claims was proper.

We must decide whether, under the facts of this case, a claim exists under 42 USC §§ 1983 and 1988 against a private attorney who filed a pleading which purported to order the arrest of the plaintiff for contempt of a court order, and plaintiff was arrested and confined, when there had been no arrest order from the court. We conclude the answer is no.

The facts as developed below in the pleadings and on discovery established that attorney Poss filed a "citation for

contempt" in DeKalb Superior Court on February 9, 1981. Poss signed this document as attorney for plaintiff. In it were allegations that John Terry Moreland had failed to abide by a divorce settlement agreement and would soon be in arrears in the sum of $432. Paragraph 4 stated: "It is further ordered by this Court that the Sheriff of DeKalb County or his lawful deputy arrest the defendant, John Terry Moreland, and incarcerate him in the common jail of DeKalb County until he purges himself of this contempt by paying to Lisa Bailey Moreland the sum of Three Hundred ($300.00) Dollars in arrearage of child support and One Hundred Thirty Two ($132.00) Dollars in arrearage on the automobile." The prayer was for judgment against Moreland for $432 plus attorney fees and costs. Attached to this document was an order signed by a DeKalb

Superior Court Judge ordering service on Moreland that he show cause at a scheduled hearing why plaintiff's prayers should not be granted.

Other defendants named below included the sheriffs of DeKalb and Rockdale Counties and a number of their employees. While it is disputed, certain employees testified that Poss called several times to inquire why the arrest had not been made. Apparently believing a valid arrest order existed, deputies of the Rockdale County Sheriff arrested Moreland and delivered him to DeKalb County deputies where he was confined several hours. Upon payment of $432, Moreland was released.

Our decision is controlled by the opinion in Lugar v. Edmondson Oil Co., 457 U.S. 922 (102 SC 2744, 73 LE2d 482) (1982). 42 USC § 1983 provides: "Every person who, under color of any statute,

ordinance, regulation, custom, or usage. of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

In Lugar, supra, the court adhered to the basic approach earlier laid down in Adickes v. S. H. Kress & Co., 398 U.S. 144 (90 SC 1598, 26 LE2d 142) (1970) and followed in Flagg Bros. v. Brooks, 436 U.S. 149 (98 SC 1729, 56 LE2d 185) (1978).[1] A plaintiff in a § 1983 action

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1 The court first determined that if the conduct depriving a plaintiff of

(footnote continued on next page)

must show (1) "that he has been deprived 'of a right secured by the "constitution and laws" of the United States,'" and that (2) the defendant acted under color of state law. The Supreme Court then set forth an analysis of the "under-color-of-state-law" part of the foregoing two-part requirement. The conduct causing the deprivation must be fairly attributable to the state in order to be conduct "under-color-of-state-law." This is characterized as the "fair attribution" test. It is itself broken into a two part approach which we outline here for ease in application to the facts of this case.

(continued from previous page)

rights amounts to "state action" under former decisions, it also amounts to action "under-color-of-state-law" as used in § 1983.

A. The deprivation must be caused by:

(i) The exercise of some right or privilege created by the state, or

(ii) a rule of conduct imposed by the state, or

(iii) a person for whom the state is responsible.

B. The party charged with the deprivation must be a "state actor" in that:

(i) He is a state official, or

(ii) he has acted together with or has obtained significant aid from state officials, or

(iii) his conduct is otherwise chargeable to the state.

A and B are separate requirements each of which is necessary to establish conduct "under-color-of-state-law." Of course, in the case of the conduct of one who has been clothed with official state

authority A and B are both present in that single circumstance because he is a person for whom the state is responsible, A(iii), and is a state official, B(i). To illustrate the nature of the separate requirements the Court cited Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (92 SC 1965, 32 LE2d 627) (1972) and Flagg Bros., supra. In Moose Lodge, supra, there was a discriminatory policy as to admitting guests to the premises of the lodge. However, this was the policy of the lodge, not of the State of Pennsylvania. The state's liquor regulatory scheme was unrelated to the discriminatory policy. The decision to discriminate could not be ascribed to the government. Therefore, part A of the two-part requirement was not met. In Flagg, supra, a warehouseman exercised a right given under a New York statute to sell the stored furniture of a debtor

which was challenged as a violation of Fourteenth Amendment due process and equal protection. The state statute was an act of the state legislature and clearly satisfied part A. But, the warehouseman was a private party acting without assistance from state officials. Part B was not met. Yet another illustration of the application of the "fair attribution" requirement is given in Lugar, supra. Count 2 of the Lugar complaint alleged that deprivation resulted from "malicious, wanton, wilful . . . and unlawful acts." This was construed as an allegation that the defendant had acted unlawfully under state law, with the result that the complained of conduct could not be ascribed to any governmental decision. The alleged conduct was contrary to the relevant governmental decision. There was no allegation the conduct was by a

person for whom the state is responsible. Therefore, all three subparts of A were absent.

In the case before this court Moreland contends Poss filed a citation for contempt in which he ordered the sheriff to arrest and incarcerate Moreland. This is an act all parties agree to be unlawful under Georgia law. Poss had no authority to issue an arrest order. Consider part A of the fair attribution test. This was clearly not the exercise by Poss of some right or privilege created by the state, but quite the opposite. Neither was there some rule of conduct imposed by the state, but a plain violation of the correct state law rule, which would have required a hearing, after notice, and a judicial determination to confine Moreland. Neither is Poss, a private attorney, a person for whom the state is responsible.

Henderson v. Fisher, 631 F2d 1115, 1119 (1980). Even though private attorneys are licensed by the State of Georgia they are not persons for whom the state is responsible within the meaning of the fair attribution test. Thus all three subparts of A are absent in this case. We do not reach part B.

This case is not controlled by either Davis v. City of Roswell, 250 Ga. 8 (295 SE2d 317) (1982) or City of Cave Spring v. Mason, 252 Ga.3 (310 SE2d 892) (1984).[2] The distinguishing factor is that the defendants in those cases were municipalities. Here we have an individual. Those cases involved an additional step, not present here, in

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2 For an excellent analysis of these two opinions and the overall impact of Monell v. Dept of Social Services, 436 U.S. 658 (98 SC 2018, 56 LE2d 611) (1978), see: R. Perry Sentell, Georgia Local Government Law's Assimilation of Monell: Section 1983 and the new "Persons." The Michie Company 1984.

order that the municipality be held responsible for acts of an individual. Here we deal directly with an individual as the defendant. While § 1983 refers to "persons" who deprive others of rights and might thereby become a defendant, it has been established that a municipality is a person within the meaning of § 1983. Monell v. New York City Dept. of Social Services, 436 U.S. 658 (98 SC 2018, 56 LE2d 611) (1978). However, since cities act only through individuals, it became necessary to decide which acts of individuals could be attributed to a city under § 1983 principles. We held in Davis, supra, that the individual must be "acting in the 'execution of a government's policy or custom. . . .'" In City of Cave Spring. supra, we added the requirement that there be an ". . . intentional policy, adopted or ratified by the governing body. . . ."

The requirement that the conduct be attributed to the city is not to be confused with the "under-color-of-state-law" requirement in § 1983 as analyzed in Lugar, supra. If the defendant is a city, it is necessary that the Lugar fair attribution test be met and that the intentional policy test of City of Cave Spring and Davis be met.

The record discloses an absence of any genuine issue as to any material fact concerning the federal law claim. OCGA § 9-11-56(c). Therefore, the trial court properly granted summary judgment and we must reverse the Court of Appeals' opinion to the contrary. The case is remanded for further consideration of the issues now pending in the trial court and for the claim of false imprisonment against Poss.

Judgment reversed. Hill, C.J., Marshall, P.J., Clarke, Smith, Gregory

and Weltner, JJ., and Judge Joseph H. Gaines concur. Bell, J., disqualified.

DECIDED JANUARY 9, 1985 -

REHEARING DENIED JANUARY 29, 1985.

Certiorari to the Court of Appeals of Georgia - 171 Ga. App. 733 (320 SE2d 841).

Bondurant, Miller, Hishon & Stephenson, Jeffrey M. Smith, Jeffrey O. Bramlett, for appellant.

James J. Macie, Smith, Welch & Meadows, Rodney G. Meadows, for appellee.

HILL, Chief Justice, concurring specially.

I concur in the opinion of the majority, but I deem it important to point out that Moreland does not contend that Poss conspired with the other defendants to deprive him of his civil rights. If there was a material question of fact as to whether such a conspiracy existed, summary judgment would not be

appropriate. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (90 SC 1598, 26 LE2d 142) (1970).

EXHIBIT D

Clerk's Office, Supreme Court of Georgia

ATLANTA 1/29/85

The motion for a rehearing was denied today:

Case No. 41462, Doss v. Moreland

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

EXHIBIT E

Administrative Report

Unusual Incident

Re: John Terry Moreland

c/a 80-7369

Civil section received a complaint for contempt on February 11, 1981. The address for service was in Stockbridge, Ga. so it was returned to the clerk of superior court to be forwarded to other county.

During the week of February 16th possibly the 19th and 20th attorney Carl W. Poss, Sr. called the Sheriff's dept. to see why Mr. John Terry Moreland had not been arrested on order he had filed a few weeks prior. Ozer O'Farrow checked to see if we had anything on Mr. Moreland. She told Mr. Poss that we did not show receiving anything on Mr. Moreland and that he should check with the clerk's office. Mr. Poss mentioned

to her that a teletype could be sent to Rockdale County.

Mr. Poss spoke to Cheryl Griswold later and stated that he wanted to know what had happened to the arrest order that he had filed. She told him he should call the warrant section and talk to them in reference to it. Mr. Poss stated that it was not a warrant it was a contempt and he was to be arrested. Cheryl referred Mr. Poss to me in the civil section. I told him that there was nothing in the civil section but he could check with the clerk's office.

Mr. Poss called at another time and told Cheryl that he had spoken to the sheriff's dept. of Rockdale County and if we would teletype them, they would arrest Mr. Moreland. Cheryl ask Sgt. Tom Rogers to speak to him since he had mentioned sending a teletype. Sgt. Rogers spoke to Mr. Poss. Mr. Poss mentioned the

teletype to him and Sgt. Rogers told him that it would come from the warrants section but he should check with the civil section. I spoke to Mr. Poss and told him to get in touch with the clerk's office and if they had an order to please hand deliver it to the sheriff's dept. The clerk's office hand carried the order to the sheriff's dept. and I processed the paper as an arrest order and put them in the envelope to send to the warrant section.

Mr. Poss again called and spoke to Sgt. Rogers in reference to the order to arrest and ask about sending the teletype. Sgt. Rogers spoke to me and I told him that I had it in the envelope to send to the warrant section. I had spoken to Olivia Davis and told her an order was on the way and needed to be teletyped to Rockdale. Sgt. Rogers called the warrant section and spoke to

Ruby McFadden to let her know if Atty. Poss called about the order to tell him it was in route to the warrant section. Ruby stated that she had Mr. Poss on the other line and would tell him.

Ruby McFadden processed the order and Olivia Davis teletyped it to the Rockdale County Sheriff's dept. at 9:35 A.M. on February 23, 1981.

Mr. Moreland was arrested by the Rockdale Co. Sheriff's dept. on the 23rd and Deputy Copeland of the DeKalb County S. O. transported him to the DeKalb Jail and booked him in on the 24th. Deputy Copeland had no paper work when he went to Rockdale County but served Mr. Moreland with the contempt when he booked him in the DeKalb Jail.

Mr. Moreland and his attorney, Mr. Macie, came to the sheriff's dept. in the morning on Feb. 26th amd stated that Mr. Moreland had been arrested on a contempt and not an arrest order.

I checked the order and realized that it was not an arrest order but a contempt. In in turn called Mr. Poss and ask him if there was another order. He stated no but that was good enough to arrest on. I explained that it was not and then went in to see Maj. Griffin and explained the situation. Maj. Griffin then spoke to Mr. Macie and told him that we would get in touch with him as soon as he had checked into it further.

Maj. Griffin ask me to go to see Judge Bell and see if he happen to have another order. I went to his office but found that he was in Rockdale County and wouldn't be in until later on that afternoon. His Sec. Faye Foster said that she would call me when he came in. I explained what had happened and she said that she remembered the atty. She called just a few minutes after I had returned to the sheriff's dept. and ask

that I come up to the Judges office. i went back to his office and she said that Mr. Poss had called her also to see if Judge Bell had signed an order that he had filled on the 24th of February (stating for us to incarcerate Mr. Moreland). She said that she preferred to talk in person because she dislike the tape recording.

Later that day at 2:00 p.m. Judge Bell came in and Faye called me to come up. Judge Bell said that he did sign the Nisi order but he really should not have been picked up on the contempt order. That he did have another order but he hadn't signed it and thought he would let Mr. Poss sweat it out. I then returned to the office.

On the 27th of Feb. Major Griffin ask me to sit in on the nisi hearing at 1:30 to see what would be said. I went up to Judge Bell's office and his sec.

told me that Judge Dean would be presiding. Judge Bell's law clerk was in the office at the time and he said that he would like to sit in also. Judge Dean stated that he really didn't see that there was any case because Mr. Moreland had already paid the $432.00 purge and was released from jail. He hoped Mr. Moreland would stay straight. Mr. Moreland's attorney was late for the hearing, it was over before he arrived.

Mr. Moreland's attorney came down stairs later in the day and ask if we would let him carry the original contempt upstairs to have a certified copy made. I told him that I would make him a copy and he could go upstairs and have it certified.

2 27 81
1500 Hrs.

/s/_____
REBECCA HENDERSON

FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1862

In The
Supreme Court of the United States
October Term, 1984

JOHN TERRY MORELAND,
Petitioner,

v.

CARL W. POSS, SR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Supreme Court exercise its discretionary power to review a non-final state court decision properly applying *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982) to dismiss a Section 1983 claim against a private party where the petitioner does not challenge the constitutionality of any state statute, regulation, or rule of conduct?

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Respondent Carl W. Poss, Sr. respectfully opposes the Petition for Writ of Certiorari to the Supreme Court of Georgia, and hereby shows that this Petition should not be granted by this Court because it does not implicate any concerns under Rule 17 and because it is jurisdictionally defective under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The Petition seeks to review an interlocutory decision by the Georgia Supreme Court affirming-in-part and reversing-in-part a partial summary judgment granted in favor of Respondent. The factual record in this case is in dispute. While some discovery has occurred, several important factual issues remain to be resolved after trial.[1] Given the procedural posture of the case, the courts below accepted as true Petitioner's self-serving allegations.

While much of the Petitioner's statement of the case is overstated rhetoric, the factually disputed matters are not significant to the narrow issue presented in the Petition. Since this Court will not resolve the factual disputes raised in this case which will be subsequently determined at trial, Respondent will not burden this Court with an extensive recitation of additional factual items, and will instead generally accede to the Petition's allegations.

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[1]Some of the factual issues that remain include who was responsible for arresting Petitioner, whether Respondent directly or indirectly caused DeKalb or Rockdale law enforcement officials to arrest Petitioner, and the specific content of any communications that allegedly took place between Respondent and the DeKalb County Sheriff's Department employees during the period in question.

Petitioner filed suit against Respondent, who is an attorney engaged in the private practice of law, and eight other defendants[2] in the Superior Court of Fulton County in the State of Georgia. The once amended Complaint alleges seven counts against all defendants based upon the following causes of action: (1) Section 1983; (2) malicious arrest; (3) false imprisonment; (4) invasion of privacy; (5) conversion; (6) assault and battery; and (7) trespass. None of the counts differentiate among the defendants. All counts reference the entire set of factual allegations set forth in the amended complaint.

The Complaint generally alleges that the order filed by Respondent was "unlawful, invalid and improper on its face; yet it was carelessly, negligent, and recklessly processed by members of the DeKalb County Sheriff's Department, who could have and should have questioned it." *Complaint*, ¶ 7. The Complaint does not challenge the

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[2]In addition to Respondent, the original defendants were (1) Pat Jarvis, Sheriff of DeKalb County; (2) Olivia Davis, Supervisor of the Warrant Division of DeKalb County Sheriff's Department; (3) Virginia Woodall, Deputy Sheriff of DeKalb County; (4) Victor B. Davis, Sheriff of Rockdale County; (5) Mark Weaver, Deputy Sheriff of Rockdale County; (6) Tony Godfrey, Deputy Sheriff of Rockdale County; and (7) Unknown members of the DeKalb County Sheriff's Department. Each of the individual defendants other than Respondent were sued both individually and in their official capacities. Plaintiff subsequently moved to dismiss his claims against Tony Godfrey, and add as defendants Rebecca S. Henderson and Garland P. Copeland, both of whom were employed in the DeKalb County Sheriff's Department. This motion was granted, and an amended complaint reflecting this change was filed.

Various defendants have filed cross-claims against other groups of defendants including cross-claims by all defendants against Respondent. Respondent subsequently cross-claimed against the other defendants.

validity of any specific state statute, regulation, or procedure. Furthermore, the Complaint does *not* allege a conspiracy between Respondent and any state official to deprive petitioner of his constitutional rights. Rather, as noted from the section of the Complaint quoted above, the complaint is primarily based upon a claim that the state officials were negligent in this specific case, and that Respondent was a catalyst.

Respondent filed a motion for summary judgment, which was granted as to all counts against him. The trial court's decision did not limit the claims pending against the other defendants. The Georgia Court of Appeals reversed the dismissal of two of the counts finding that Petitioner had a valid cause of action against Respondent based upon: (1) the federal Section 1983 claim; and (2) a state claim for false imprisonment. The Georgia Court of Appeals affirmed the dismissal of the remaining counts against Respondent.

The Georgia Supreme Court subsequently reversed the Georgia Court of Appeals on the Section 1983 federal claim, but affirmed on the state law false imprisonment claim.

SUMMARY OF ARGUMENT

The Petition is based upon two arguments both of which are incorrect. First, Petitioner claims that the Georgia Supreme Court erred in even considering *Lugar v. Edmondson Oil Co.* Second, even assuming that *Lugar* is relevant, Petitioner suggests that the Georgia Supreme

Court erred in applying *Lugar* to the specific allegations of this case.

The Georgia Supreme Court properly relied upon this Court's analysis of Section 1983 contained in *Lugar*. In addition, the Georgia Supreme Court's application of *Lugar* to this highly fact specific case was correct. Petitioner attempts to distinguish *Lugar* by focusing on the Respondent's allegedly improper *private* activities. This purported distinction demonstrates the correctness of the result below. As made clear in *Lugar*, a Section 1983 plaintiff asserting claims against a private individual must challenge the constitutionality of some state statute, rule, or course of conduct in order to meet the "under color of state law" requirement. Private misuse of some state procedure is insufficient.

In addition, the Georgia Supreme Court's decision is not final. Trial on the merits against the remaining defendants and against Respondent on a related state law claim remains. Accordingly, the Petition is jurisdictionally defective.

1. The Georgia Supreme Court's reliance on and application of Lugar v. Edmondson was correct, and does not conflict with any other federal Court of Appeals or other state court of last resort.

Petitioner primarily argues that the Georgia Supreme Court's analysis of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) was improper because (1) *Lugar* should be limited to its facts involving a Section 1983 challenge to a state's pre-judgment attachment provision; and (2) even if *Lugar* were relevant, the Georgia Supreme Court's analysis misapplied the test established therein.

The first argument is frivolous. Relying on a footnote in *Lugar* that its *holding* was limited to the pre-judgment attachment context and certain statements in Justice Powell's dissenting opinion, Petitioner suggests that Lugar's *analysis* cannot be applied outside of its specific factual context. This "head-in-the-sand" approch is both novel and without support. Other courts are certainly entitled to rely on *Lugar* when analyzing whether a private party is properly chargeable under Section 1983 with acting "under color of state law." Numerous courts have relied on *Lugar* as controlling authority for determining the color of state law issue. *See, e.g., Dahlberg v. Becker,* 748 F.2d 85 (2d Cir. 1984) (applying *Lugar* to a Section 1983 claim by a husband against his former wife's attorney), *cert. denied,* — U.S. —, 105 S.Ct. 1845 (Case No. 84-1246, March 25, 1985); *Krynicky v. University of Pittsburgh,* 742 F.2d 94 (3d Cir. 1984) (applying *Lugar* to a Section 1983 claim by dismissed employee against university), *cert. denied,* — U.S. —, 105 S.Ct. 2018 (1985); *Cruz v. Donnelly,* 727 F.2d 79 (3d Cir. 1984) (applying *Lugar* to a Section 1983 claim by customer against store owners).

Petitioner attempts to distinguish *Lugar* by noting that the claim involved a constitutional challenge to a state procedure with substantial governmental involvement, an allegation not present here. *Petition,* pp. 13-14. In *Lugar,* the Court concluded that the petitioner could only assert one of his claims under Section 1983 because that claim sufficiently alleged that the state statute under which the private party acted was constitutionally defective. *Lugar,* at pp. 940-941.

In attempting to avoid *Lugar,* Petitioner has demonstrated why the Georgia Supreme Court's result was cor-

rect. As explained in *Lugar*, Section 1983 is simply not available against private parties absent some meaningful connection to or challenge of a state law. Thus, "private misuse of a state statute does not describe conduct that can be attributed to the State . . . ." *Lugar*, at p. 941, *See, e.g., Dahlberg, supra*, 748 F.2d at 90; *Duncan v. Peck*, 752 F.2d 1135, 1141 (6th Cir. 1985); *Turner v. Kaiser Aluminum & Chemical Co.*, 602 F.Supp. 519, 523-24 (M.D. La. 1984). *Cf. Loyd v. Loyd*, 731 F.2d 393, 398-99 (7th Cir. 1984) (under *Lugar*, the "distinction between an attack on the constitutionality of a statute and an attack on a person's alleged misuse of that statute is crucial").

In *Lugar*, the Court affirmed the dismissal of one count of the petitioner's complaint against Edmondson Oil Company based upon the respondent's "unlawful acts." By alleging that a private party committed unlawful acts, that claim was fundamentally inconsistent with Section 1983's purpose of insuring that state law or state officials not work a serious deprivation of constitutional rights for which the State is properly chargeable. If an act committed by a private party is clearly unlawful under state law, the complaint cannot properly allege that the acts were sufficiently related to "any governmental decision." *Lugar*, at p. 940. Instead, the claim would be that the private party defendants "were acting contrary to the relevant policy articulated by the State." *Id.* While the unlawful acts may give rise to state law claims, they do not provide a basis for a federal claim under Section 1983. *See Dahlberg*, 748 F.2d at 93.

The allegations raised by the petitioner on this interlocutory appeal fall squarely into *Lugar's* description of purely private conduct not actionable under Section 1983. It is acknowledged that Georgia law does not condone or

support the actions allegedly undertaken by the Respondent. Petitioner does not challenge the constitutionality of any Georgia statute, rule, or standard of conduct, nor does he allege any conspiracy or on-going relationship constituting some sort of pattern or practice between state officials and respondents.[3]

The result below is consistent with other federal courts of appeals that have considered similar issues. Most notably, the decision is consistent with *Dahlberg v. Becker, supra.*[4] In *Dahlberg,* the Plaintiff brought suit against his former wife and her attorneys based upon the filing of an order to show cause why he should not be held in contempt for failing to make payments pursuant to a divorce settle-

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[3]If a conspiracy existed between private parties and state officials to deprive a plaintiff his constitutional rights, a Section 1983 claim would be proper. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970). *Cf. Dennis v. Sparks,* 449 U.S. 24 (1980). Chief Justice Hill expressly noted that no conspiracy was alleged here. *See Petition,* at p. 25a. Second, if there were an ongoing relationship showing some type of pattern such as where a store arguably has an arrangement with local police officers for handling shop-lifting cases in a manner that deprives citizens' constitutional rights, Section 1983 may be properly invoked. *See, e.g., Robb v. City of Philadelphia,* 733 F.2d 286, 292 (3d Cir. 1984). *Cf. Cruz v. Donnelly,* 727 F.2d 79 (3d Cir. 1984). No such allegations can be made here; rather, Petitioner repeatedly argues the significance of the unusual and indeed unique nature of the alleged events.

[4]Petitioner cites *Dahlberg* apparently for the proposition that it seems to set forth a somewhat different test in that it suggests three subparts rather than two with respect to the first prong of the *Lugar* test. *Petition,* p. 22. It is unclear whether Petitioner asserts that this alleged semantical difference is either significant or constitutes a conflict. Certainly the result in *Dahlberg* is totally consistent with the Georgia Supreme Court's resolution of this case.

ment agreement. As a result of the filing of the order, the plaintiff was subsequently arrested and held overnight.

The Court determined on a motion to dismiss that the allegations were insufficient to state a cause of action under Section 1983. "A private party's misuse of New York's Judiciary Law that causes plaintiff to be imprisoned overnight is not fairly attributable to New York State." 748 F.2d at 90. As with the Petitioner in this case, the plaintiff did not allege that New York's procedures for noticing or adjudicating contempt were constitutionally defective. The allegation in *Dahlberg* claimed only that the private party defendants had run afoul of the statutory framework. *See Diulus v. Churchill Valley Country Club*, 601 F.Supp. 677 (W.D. Pa. 1985) (dismissing Section 1983 claims against attorney who allegedly misused judicial proceedings).

The Georgia Supreme Court properly applied *Lugar* to dismiss the federal Section 1983 claim against Respondent. Since there is no conflict on the fact-specific issue raised in this case, this Court should deny the petition on the merits.[5]

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[5]None of the cases cited by Petitioner are to the contrary, and thus no conflict exists. In his argument, Petitioner primarily criticizes the Georgia Supreme Court for deciding the case under the first prong of the "fair attribution" test enunciated in *Lugar* rather than the second prong. While the cited cases do resolve the semantical question differently, there is no conflict with respect to the application of Section 1983 to attorneys on the facts cited. *Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984), clearly supports the decision below in that it held that an isolated incident, such as the one involved in this case, did not support a Section 1983 claim. The remaining cases cited by

(Continued on next page)

2. The decision below is not final.

The Supreme Court may only review "*final* judgments or decrees rendered by the highest court of a state . . . ." 28 U.S.C. § 1257 (emphasis added). In order to be reviewable, the state court judgment must be final as to all parties and issues. *See* Stern & Gressman, *Supreme Court Practice* 177 (5th ed. 1978). The considerations informing the finality doctrine are many and include maintaining harmonious relationships between federal and state courts by minimizing federal intrusion into state affairs. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973).

The decision below is clearly not final. The Georgia Supreme Court's decision only considered one claim against one defendant in a multi-count, multi-party suit. As set forth in the Statement of the Case, Respondent is one of nine defendants. All causes of actions and claims against

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(Continued from previous page)

Petitioner involved far more substantial governmental involvement in entirely different factual contexts. *See Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) (extensive and cooperative police involvement with landlord evicting tenant); *Morrison v. Washington County*, 700 F.2d 678 (11th Cir. 1983) (doctor in *public* hospital who had police remove and arrest patient), *cert. denied*, 464 U.S. 864 (1983).

The semantical distinction asserted by Petitioner has already been presented to the Court and rejected. The Second Circuit in *Dahlberg*, like the Georgia Supreme Court in the present case, held that an attorney's alleged misuse of state court procedures resulting in the arrest of a divorced husband did not constitute fair attribution under the first prong of *Lugar*. *Dahlberg, supra*, 748 F.2d at 90. The Court denied cert in *Dahlberg* on March 25, 1985, (Case No. 84-1246), thus rejecting the significance of any wording differences between *Dahlberg* and *Howerton* based upon which portion of the test is used.

the remaining defendants, *which include federal claims under Section 1983,* remain pending.

More importantly, even Petitioner's case against Respondent has not been finally adjudicated. Rather, while the trial court's dismissal of the federal claim was affirmed, a state law claim for false imprisonment *involving the identical factual allegations against Respondent* remains to be tried. *See Georgia Supreme Court Order* (remanding the case "for further consideration of the issues now pending in the trial court and for the claim of false imprisonment against Poss") (*Petition,* at p. 24a).

None of the applicable exceptions set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), are applicable. In *Cox,* the Court identified four exceptions to the finality doctrine permitting immediate review of nonfinal state court decisions. A brief description together with an explanation as to why the particular exception is not present in this case follows:

1. Immediate review is possible where the result on remand is pre-ordained. *Cox,* 420 U.S. at 479. Here, the result of the trial against the other defendants and the Respondent is not pre-ordained. Rather, as noted by the Georgia Supreme Court, several factual issues are disputed among the parties. Accordingly, the result of the trial is unknown. The trial probably will clarify many of the factual allegations which bear directly upon the federal claim raised in the Petition. For example, the trial may determine facts relevant to the Section 1983 federal claims against the other defendants which could conceivably moot the Section 1983 claim against Respondent. *Cf. Cox,* 420 U.S. at 477-78. It is premature to determine the

federal issues on the incomplete factual record now before the Court.[6]

2. Immediate review is also possible where the federal claims would survive *regardless* of the outcome on remand. *Cox*, 420 U.S. at 480. The present federal claim is not destined to survive the outcome of the remand. The trial will raise the same factual claims which Petitioner alleges support not only the Section 1983 federal claim against Respondent, but all other remaining claims.

3. A third exception exists for cases in which subsequent federal review would be barred by state law. *Cox*, 420 U.S. at 481. This exception is not applicable here. Following trial, all parties will maintain their full rights of appeal under state law.

4. Lastly, the Court has recognized an exception whereby a definitive ruling on the federal issue would preclude any further litigation, as opposed to a situation where immediate review would merely control the "nature and character of, or determine the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 483. This exception is not present. A final determination by this Court of the federal issue decided in the Geor-

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[6]In the context of a Section 1983 case, the existence of disputed factual issues argues strongly against appellate review. *See International Society for Krishna Consciousness v. Air Canada*, 727 F.2d 253, 255 (2nd Cir. 1984) (dismissing an interlocutory appeal as improvidently granted finding that the issues would be more sharply focused if it were a final judgment). Respondent believes that the record is sufficient to determine his non-liability under Section 1983. However, even assuming that the Georgia Supreme Court's position is arguably incorrect, it will be far more efficient to make that determination on the basis of a complete factual record.

gia Supreme Court would not preclude trial on the remaining state law and federal law issues against the other defendants or the state law claim against Respondent.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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